84-1305

No. ____

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1984

Carolyn Epperson, *Petitioner*

V.

Estate of Buel Epperson, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

RICHARD L. SMITH

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QUESTION PRESENTED

Whether *Ark. Stat. Ann.* §60-501 (1983 Supp.), which contains a legislative distinction between a surviving spouse married for less than one year and one married for more than one year before the surviving spouse can exercise a statutory right to take against the deceased spouse's will, is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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No. ____

In the
Supreme Court of the United States

October Term, 1984

Carolyn Epperson, *Petitioner*

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Estate of Buel Epperson, *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Carolyn Epperson, the petitioner herein, prays that a writ of certiorari issue to review the judgment of Arkansas Supreme Court entered in the above entitled case on December 17, 1984.

OPINIONS BELOW

The opinion of Arkansas Supreme Court is reported at ____ Ark. ____, 679 S.W.2d 792 (1984) and is printed in Appendix A hereto, infra page 13. The decree of Arkansas Supreme Court is printed in Appendix A hereto, infra, page 11.

JURISDICTION

The opinion of the Arkansas Supreme Court was rendered on November 13, 1984. A timely petition for rehearing was denied on December 17, 1984, and judgment was entered on that date. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment of the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the first two subsections of *Ark. Stat. Ann.* §60-501 (1983 Supp.), which provides as follows:

> When a married person dies testate as to all or any part of his or her estate, the surviving spouse shall have the right to take against the will provided the surviving spouse has been married to the decedent continuously for a period in excess of one (1) year, and in the event of such election the rights of the surviving spouse in the estate of the deceased spouse shall be limited as follows:
>
> (a) The surviving spouse, if a woman, shall receive dower in the deceased husband's real estate and personal property as if he died intestate, which dower

shall be additional to her homestead rights and statutory allowances;

(b) The surviving spouse, if a man, shall receive a curtesy interest in the real and personal property of the deceased spouse to the same extent as if she had died intestate, which curtesy interest shall be additional to his homestead rights and statutory allowances; . . .

STATEMENT OF THE CASE

This controversy originated as probate claim brought by the petitioner, Carolyn Epperson, against the estate of her deceased husband, Buel Epperson, to establish her statutory interest in the decedent's estate. Buel Epperson executed his Last Will and Testament on January 20, 1980. At the time of execution, he was married to Wanda Epperson and had two children. That will bequeathed his property to Wanda Epperson and his children either by an outright bequest or through two testamentary trusts. Buel and Wanda Epperson were divorced on March 29, 1982. The deceased married the petitioner, Carolyn Epperson, on August 30, 1982. Buel Epperson died less than one year later on June 20, 1983, without either revoking the August, 1980 Will, or executing another will.

The deceased's Will was admitted to probate by the Probate Court of Pulaski County, Arkansas, on June 23, 1983. Carolyn Epperson filed a petition to take against the will her dower rights and statutory allowances from the estate pursuant to *Ark. Stat. Ann.* §60-501 (1983 Supp.). The estate objected, citing that portion of *Ark. Stat. Ann.* §60-501, supra., which precludes a surviving spouse from taking against the will if the couple had been married for one year or less. Carolyn Epperson then filed a brief with the Probate Court on December 6, 1983, asserting that the statutory discrimination contained in *Ark. Stat. Ann.* §60-501 violated the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause was passed on by the Probate Court of Pulaski County, Arkansas, at a hearing on January 30, 1984. The Probate Court found that the statutory classification created by §60-501 was arbitrary, unreasonable, and served no important governmental objective, and thus, violated the Equal Protection Clause of the Fourteenth Amendment. See Appendix A, Page 19. The Probate Court also ruled that §60-501 conflicted with the Arkansas dower laws and was not applicable when the will predated the marriage.

The estate of Buel Epperson timely appealed to the Arkansas Supreme Court, where the Equal Protection issue was addressed both by the appellant and the appellee. The Arkansas Supreme Court reversed the Probate Court, ruling that the discrimination contained in §60-501 was not invidious since it was related to a legitimate governmental objective in deterring deathbed marriages. See Appendix A, Page 13. The Arkansas Supreme Court also found that the statutes did not conflict with the State's dower laws and applied when the will predated the marriage.

Carolyn Epperson timely filed a petition for rehearing which was denied on December 17, 1934.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE ARKANSAS SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

The statutory classification contained in *Ark. Stat. Ann.* §60-501 (1983 Supp.) does not rest upon material differences. There is no valid distinction between surviving spouses who have been married for more than one year and those surviving spouses who have been married for one year or less. To pass constitutional muster, a statutory classification must: (1) bear a rational relationship to the purpose of the act, and (2) the classification's distinction must rest upon material differences. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029 (1972); *Rinaldi v. Yeager*, 384 U.S. 305, 86 S.Ct. 1497 (1966). The decision of the Arkansas Supreme Court conflicts with those decisions.

The Arkansas Supreme Court erred in finding that the discriminatory classification contained in §60-501 was based on criteria related to the Act's statutory objective. But even if there was a rational basis for the classification (which is not conceded), the majority erred in failing to consider whether the classification rested on material differences. In its ruling, that court completed only half of the constitutional analysis required by the decisions of this Court.

The basic principals governing the application of the Equal Protection Clause of the Fourteenth Amendment are well known.

> [T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (Citations omitted). The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of

> criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Eisenstadt v. Baird*, 405 U.S. 438, 446-447, 92 S.Ct. 1029, 1035 (1972), quoting *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253 (1971).

Arkansas Act 714 of 1981, codified at *Ark. Stat. Ann.* §60-501 (1983 Supp.), was passed in response to certain decisions of this Court and the Arkansas Supreme Court declaring gender-based statutory distinctions as a violation of the Equal Protection Clause of the Fourteenth Amendment. See *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102 (1979); *Stokes v. Stokes*, 271 Ark. 300, 612 S.W.2d 372 (1981); *Hess v. Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981). The purpose of that Act was to bring existing Arkansas law relating to homestead, dower, curtesy, statutory allowances payable from the decedent's estate, and the right of the surviving spouse to take against the will of the decedent into constitutional compliance, and "to insure that the law provides equality in the property rights and interests of married persons." Arkansas Act 714 of 1981, §75.

The statutory classification established in §60-501 bears no rational relation to the legislative purpose of the Act. A classification must bear some reasonable relation to the legislative purpose; otherwise it violates the Equal Protection Clause. *Eisenstadt v. Baird*, supra 405 U.S. at 477, 92 S.Ct. at 135; *Morey v. Doud*, 354 U.S. 457, 465, 77 S.Ct. 1344, 1350 (1957). The classification contained in *Ark. Stat. Ann.* §60-501 in no way relates to the purpose of the statute, i.e. to remove gender based distinctions, and as such is unconstitutional.

The Arkansas Supreme Court found that the classification precluding a spouse who had been married for less than a year from electing to take against the will of the deceased

spouse, had a rational relationship to a legitimate government objective. According to the majority, this objective was the discouragement of deathbed marriages. This finding was made even though there was nothing in the legislative history which indicated that preventing deathbed marriages was a purpose of Arkansas Act 714 of 1981. Statutory discrimination must be based on differences that are reasonably related to the purposes of the act in which the distinctions are found. See *Morey v. Doud*, supra 354 U.S. at 465, 77 S.Ct. at 1350. The statutory discrimination bears no rational relationship to the stated purpose of Act 714.

Even assuming the Act's discriminatory purpose was to protect persons on their deathbed from would-be suitors, the statute is still deficient. There is no ground of difference which rationally explains the different treatment accorded those persons married one year or less, and those persons married greater than one year. See *Eisenstadt v. Baird*, supra 405 U.S. at 477, 92 S.Ct. at 1035; *Rinaldi v. Yeager*, 384 U.S. at 308, 86 S.Ct. at 1499.

> "[T]he Equal Protection Clause does require that in defining a class subject to legislation, the distinctions that are drawn have some relevance to the purpose for which the classification was made. *Id.*, at 384 U.S., 309, 86 S.Ct. 1500, citing *Baxstrom v. Herold*, 384 U.S. 107, 111, 86 S.Ct. 760; *Carrington v. Rash*, 380 U.S. 83, 89, 85 S.Ct. 775, 778; *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 37, 48 S.Ct. 423, 425; *Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 425, 40 S.Ct. 560."

The legislative distinction upheld by the Arkansas Supreme Court is purely arbitrary and conflicts with the decisions of this Court. There is no relevance to the distinctions between persons married less than one year and persons married more than one year.

This Court has ruled that once a legislative distinction is made, the resultant discrimination cannot be justified if it

is not reasonably related to a genuinely different characteristic. *Morey v. Doud*, supra. There is no explanation for the different treatment accorded those persons married 365 days or less, and those persons married 366 days or more. Assuming that the State of Arkansas had a rational basis for the classification, the distinction which it drew is unreasonable and purely arbitrary. That distinction conflicts with the decisions of this Court, and as such, is violative of the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court of Pennsylvania and the District of Columbia Court of Appeals have dealt with statutes which are analogous to the statute before this Court. Both Courts ruled that mortmain statute providing that any bequest to a clergyman or a religious organization is invalid if made within 30 days of the testator's death, violates the Equal Protection Clause since it bears no rational relationship to the purpose of protecting the family of the testator from undue influence. See *Estate of French, Key v. Doyle*, 365 A.2d 621 (Dist. Col. App. 1976) cert. denied and app. dism'd. 434 U.S. 59 (1977); and *Estate of Cavill*, 459 Pa. 411, 329 A.2d 503 (1981). Like those constitutionally deficient mortmain statutes, the classification contained in *Ark. Stat. Ann.* §60-501 (1983 Supp.) violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

The decision of the Arkansas Supreme Court conflicts with the decisions of this Court, and decisions of the highest Courts of other states dealing with similar statutory classifications. The statutory discrimination contained in §60-501 bears no relationship to the purpose of the statute, and the Arkansas Supreme Court erred in failing to consider whether the statutory distinction rested upon material differences. Certiorari should be granted.

Respectfully submitted,

BY: RICHARD L. SMITH

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Attorney for Petitioner

APPENDIX A

Supreme Court #84-133
REVERSALS CHANCERY DISTRICT

STATE OF ARKANSAS)
) SCT.
In the Supreme Court)

BE IT REMEMBERED, That a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 1st day, being the first Monday of October, A.D. 1984, amongst others, were the following proceedings, to-wit: On the 13th day of November, A.D. 1984, a day of said term:

ESTATE OF BUEL EPPERSON)
)
_____)
Appellant

Appeal from Pulaski
Probate Court
First District

No. 84-133 vs.

CAROLYN EPPERSON)
)
_____)
Appellee

THIS CAUSE came on to be heard upon the transcript of the record of the Probate Court of Pulaski County, First District, and was argued by solicitors; on consideration whereof it is the opinion of the Court that there is error in the proceedings and decree of said Probate Court in this cause as set out in the opinion herein delivered.

IT IS THEREFORE ORDERED AND DECREED by the Court that the decree of said Court in this cause rendered be, and the same is hereby reversed, annulled and set aside with costs; and that this cause be remanded to said

Probate Court for further proceedings to be therein had according to the principles of equity and not inconsistent with the opinion herein delivered.

IT IS FURTHER ORDERED AND DECREED, That said appellant recover of said appellee all its costs in this Court in this cause expended, and have execution thereof.

Purtle and Hollingsworth, JJ., dissent.

IN TESTIMONY, That the above is a true copy of the decree of said Supreme Court rendered in the case therein states, I, DONA L. WILLIAMS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of the Supreme Court, at my office in the City of Little Rock this 17th day of December, A.D. 1984.

/s/ Dona L. Williams
Clerk

By _____
D.C.

SUPREME COURT OF ARKANSAS

IN THE MATTER OF THE ESTATE OF BUEL EPPERSON, DECEASED

APPEAL FROM THE PULASKI COUNTY PROBATE COURT, FIRST DIVISION

HONORABLE LEE MUNSON, JUDGE

REVERSED AND REMANDED

WEBB HUBBELL, CHIEF JUSTICE

Buel Epperson executed a will on August 29, 1980, bequeathing his personal property to his wife, Wanda, if she survived him, and the rest, residue, and remainder of his estate to the Buel Epperson Family Trust. Buel and Wanda were divorced on March 29, 1982, and Buel married appellee, Carolyn Epperson on August 30, 1982. Buel Epperson died less than a year later on June 20, 1983, without having made a new will.

The August 29, 1980 will was admitted to probate, and appellee filed a petition to elect her dower rights against the will. The appellants, the estate of Buel Epperson, objected, citing *Ark. Stat. Ann.* §60-501 (Supp. 1983), which precludes a spouse from asserting a dower or curtesy right by taking against a will unless the surviving spouse had been married to the decedent continuously for a period in excess of one year. The probate court ruled that §60-501: 1) conflicted with the Arkansas dower statutes; 2) was not intended to be applied when the will predates the marriage; and 3) was unconstitutional. We reverse and remand.

The probate court found that *Ark. Stat. Ann.* §60-501 (Supp. 1983) conflicts with Arkansas dower laws. We have a duty, if possible, to reconcile our state's statutes to make them consistent, harmonious, and sensible. *Shinn v. Heath*, 259 Ark. 577, 535 S.W.2d 57 (1976). §60-501 requires a surviving spouse to

be married for more than one year before the spouse can take against the will. No similar requirement is placed on the surviving spouse if the decedent dies intestate. *Ark. Stat. Ann.* §60-501 *et seq.* (1983 Supp.).

The legislature has the power to give or withhold dower, and it has the power to declare the manner in which the dower right might be barred. *Skelly Oil v. Murphy*, 180 Ark. 1023, 24 S.W.2d 846 (1930). Thus, it is within the province of the legislature to withhold dower where there is a will. However, the legislature merely limited, rather than withheld, dower rights where there is a will. Only those persons who have been married for more than a year may elect to take dower rights when there is a will. §60-501 limits dower rights, but does not conflict with §60-201 *et seq.*, which define dower rights.

The probate court found §60-501 unconstitutional as a violation of the 14th Amendment of the United States Constitution. When considering an equal protection challenge to a state legislative classification scheme which does not involve either a "suspect" classification or "fundamental" right, the proper test is whether the classification bears some rational relationship to a permissible state objective. *Dandridge v. Williams*, 397 U.S. 471 (1970). In order to evaluate whether there is a rational relationship, we examine (1) the character of the classification, (2) the individual interests asserted in support of the classification, and (3) the governmental interests asserted in support of the classification. *Corbitt v. Mohawk Rubber Co.*, 256 Ark. 932, 511 S.W.2d 184 (1974).

The statute classes differently those people who have been married less than one year from those who have been married more than one year. The Equal Protection Clause prohibits invidious discrimination but does not require identity of treatment. A classification is not invidious if some rational basis can be found to support it. *Pridgeon v. State*, 266 Ark. 151, 587 S.W.2d 225 (1979); *Yarbrough v. Ark. State Highway Commission*, 260 Ark. 161, 539 S.W.2d 419 (1961).

§60-501 precludes a new spouse from immediately receiving full dower or curtesy rights when there is a will. Individual and governmental interests in this limitation include discouragement of deathbed marriages, and the classification bears a rational relationship to that objective.

Appellee asserts that §60-501 can be compared to a Pennsylvania mortmain statute, held unconstitutional as violative of Equal Protection by the Pennsylvania Supreme Court. *Estate of Cavill*, 459 Pa. 411, 329 A.2d 502 (1974). That mortmain statute makes invalid bequests for religious purposes included in a will executed within thirty days of death, unless those who would benefit by its invalidity agree that it shall be valid. The Pennsylvania Court, quoting *Eisenstadt v. Baird*, 405 U.S. 438 (1972) found that the states do not have the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. However, §60-501 is based on criteria related to its objective. It protects assets of a decedent in cases in which the assertion of a dower interest would often be contrary to the decedent's intent. *Ark. Stat. Ann.* §60-501 (Supp. 1983) is constitutional and does not violate the 14th Amendment.

Since we uphold the constitutionality of §60-501, appellant's failure to serve the Attorney General with a copy of the proceedings pursuant to *Ark. Stat. Ann.* 34-2510 (Repl. 1962) is not prejudicial. However, we would have reversed and remanded on that issue had we not found the statute constitutional. *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1983).

The probate court also found that §60-501 was not intended to be applied when the will predates the marriage because of *Ark. Stat. Ann.* §60-407 (Repl. 1970). §60-501 applies when a married person "*dies testate* as to all or any part of his or her estate" (Emphasis supplied). §60-501 does not make any distinction between those wills predating a marriage and those wills made after a marriage. *Ark. Stat. Ann.* §60-407 provides:

> If after making a will, the testator is divorced all provisions in the will in favor of the testator's spouse are thereby revoked . . . .

In *McGuire v. McGuire*, 275 Ark. 432, 631 S.W.2d 12 (1982), we said the clear meaning of this statute is that any bequest to the former spouse is void, but the remainder of the will remains in effect. Unless the will is completely revoked because all of its substantive provisions favor the decedent's former spouse, the decedent will have died testate, and §60-501 will apply. §60-407 does not require a holding that §60-501 was not intended to be applied when the will predates a marriage.

Since we are reversing the probate court, we remand for further proceeding consistent with this opinion. Neither appellant nor appellee discusses, and the trial court did not make a finding whether decedent's will should have been completely revoked because of §60-407. The residue of the estate under the will goes to a trust that appears to be for the benefit of decedent's former spouse and children, but this issue was not addressed or developed below, so we do not reach that issue on appeal.

Reversed and remanded.

DISSENT

P.A. Hollingsworth, Justice. The Court correctly states that §60-501 requires a surviving spouse to be married for more than one year before the spouse can take against the will. The Court then recognizes the fact that no similar requirement is placed on the surviving spouse if the decedent dies intestate. There is recognition of the different treatment the statute gives to those people who have been married less than one year from those who have been married more than one year.

It is clear that under §60-407 the former wife, Wanda Epperson, takes nothing under the will. The remaining issue is whether the children take everything or whether the present wife, Carolyn Epperson, has a right to elect to take against the will since she had not been married to the decedent one year.

The Court holds today that §60-501 is a valid governmental interest discouraging deathbed marriages. However, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the United States Supreme Court stated:

> The Equal Protection Clause of [the Fourteenth Amendment] does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Citations omitted.

One statute, §60-501, precludes a surviving spouse from participating in the deceased spouse's estate because of a marriage lasting less than one year. Another section of statutes, §60-201, *et seq.*, allows a surviving spouse to be endowed in fee simple to various percentages to the decedent spouse's estate regardless of the length of marriage. Clearly, the statutory classification bears only the most tenuous relation to the legislative purpose. Such a combination of results can only be characterized as arbitrary. Therefore, the Equal Protection Clause forbids us to give it any effect.

I would affirm.

Purtle, J., joins in this dissent.

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK
DECEMBER 17, 1984
(Filed December 18, 1984)

Daniel R. Carter
Attorney at Law
P.O. Box 3644
Little Rock, AR 72203

Re: 84-133 In the matter of the Estate
of Buel Epperson

Dear Mr. Carter.

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

/s/ Dona L. Williams
Dona L. Williams, Clerk

DLW:rh

cc: Merl O. Barns
Shirley D. Smith

IN THE PROBATE COURT OF
PULASKI COUNTY, ARKANSAS
FIRST DIVISION

IN THE MATTER OF THE
ESTATE OF BUEL EPPERSON,
Deceased No. 83-0907

ORDER

On this 30th day of January, 1984, the Court having heard argument of counsel and having considered the briefs filed herein and other matters before it, the following findings of fact and conclusions of law:

FINDINGS OF FACT

Decedent, Buel Epperson and Carolyn Epperson were married on August 30, 1982. Buel Epperson died on June 20, 1983, less than one year after his marriage. The decedent executed his Last Will and Testament on August 29, 1980, while he was still married to his previous wife; the will, therefore predates his marriage to Carolyn Epperson. As the surviving spouse, Mrs. Epperson has elected to take against the will. The estate, relying on *Ark. Stat. Ann.* §60-501, seeks to preclude Mrs. Epperson from exercising her right to elect, based on the one year limitation in the statute as amended by the Arkansas Legislature in 1981. Such preclusion shall leave the widow with no interest in the estate whatsoever.

CONCLUSIONS OF LAW

Ark. Stat. Ann. §60-501 creates two classes of persons, namely those who have been married longer than one year and those who have been married one year or less thus discriminating against persons married for the shorter period. This statute is arbitrary and unreasonable and serves no important government objective. In addition, it is in conflict with the

Arkansas dower laws which are intended to provide for the surviving spouse, and it should not be applied when the will predates the marriage because of *Ark. Stat. Ann.* §60-407.

Therefore, it is CONSIDERED, ORDERED AND ADJUDGED that:

Ark. Stat. Ann. §60-501

a) conflicts with the Ark. dower laws; which serves an important governmental interest, namely, to provide for widowed spouses.

b) is not intended to be applied when the will predates the marriage;

c) is unconstitutional as a violation of equal protection of law as protected by the 14th amendment to the United States Constitution.

That petitioner, Carolyn Epperson has the right to elect to take against the will of the decedent.

/s/ Lee Munson
PROBATE JUDGE

APPROVED:

RICHARD L. SMITH, P.A.
Suite 727, Pyramid Place
Little Rock, AR 72201
(501) 372-5745

By:_____
RICHARD L. SMITH

CERTIFICATE OF SERVICE

I, Richard L. Smith, a member of the Bar of the Supreme Court of the United States and counsel of record for Carolyn Epperson, petitioner herein, hereby certify that on February 13, 1985, pursuant to Rule 33, Rules of the Supreme Court, I served Estate of Buel Epperson three copies of the attached Petition for Writ of Certiorari on each of the parties herein, as follows:

On Estate of Buel Epperson herein, by depositing such copies in the United States Post Office, Little Rock, Arkansas, with first class postage prepaid, properly addressed to the post office address of Merl O. Barnes, the above-named Estate of Buel Epperson's counsel of record at 504 Pyramid Place, 2nd and Center Streets, Little Rock, Arkansas 72201.

All parties required to be served have been served.

Dated February 13, 1985.

Richard L. Smith

RICHARD L. SMITH, P.A.
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P.O. Box 3644
Little Rock, AR 72203
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(2)

No. 84-1305

Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS
CLERK

In the
Supreme Court of the United States

October Term, 1984

Carolyn Epperson, *Petitioner*

V.

Estate of Buel Epperson, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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STATUTES:

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No. 84-1305

In the

Supreme Court of the United States

October Term, 1984

Carolyn Epperson, *Petitioner*

V.

Estate of Buel Epperson, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Estate of Buel Epperson, Respondent herein, prays that the Petition for Writ of Certiorari to review the judgment of the Arkansas Supreme Court entered in the above entitled case on December 17, 1984 be denied.

REASONS FOR DENYING THE WRIT

1. NO CONFLICT EXISTS SUFFICIENT TO MERIT CERTIORARI BETWEEN THE DECISION OF THE ARKANSAS SUPREME COURT HEREIN, THE DECISIONS OF THIS COURT, AND THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

The conflicts which the petitioner posits between this decision, prior decisions of this Court, and decisions of other state courts of last resort can only charitably be classified as wishful thinking. Petitioner's attempt to pigeonhole the decision below as somehow being contrary to some prior holding of this Court is jurisprudentially based upon so broad and general a brush as to be safely ignored.

To be sure, the statute in question was one of many statutes amended under Arkansas Act 714 of 1981 which was an omnibus statute amending numerous Arkansas laws so as to erase gender-based statutory distinctions in Arkansas statutory law. However, from this unassailable position, Petitioner makes the patently unsustainable argument that any additional legislative objective (e.g. the preclusion of "Deathbed" spouses being able to inherit a statutory interest absent such a specific disposition by the testator), which goes beyond the main purpose of the omnibus statute can only be judged for constitutional purposes by the standard of "Does it seek to erase gender-based classifications?"

Arkansas Statute §60-501, both before and after its amendment by Arkansas Act 714 of 1981, had as its purpose the definition of those surviving spouses who could elect to take against a will. The present statute is reasonably related to this objective in that it excludes from that category those persons who have been married to the decedent for less than a year. Upon this statutory scheme, the petitioners try to superimpose only the most general language from prior decisions of this Court. More controlling on the facts in this case insofar as equal

protection analysis is concerned is the following prior discussion by this Court:

> "We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat, *the classification need not be scientific or logically appropriate and if not palpably arbitrary and is uniform within the class, it is within such discretion.*" (emphasis supplied) *Mutual Loan Co. v. Martell*, 222 U.S. 225, 32 S.Ct. 74 (1911).
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> . . .
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> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups and citizens differently from others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A *statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it.* (Citations omitted)" (emphasis supplied) *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101 (1961).

With reference to this well-accepted presumption accorded a state that it has acted within its constitutional power, as Mr. Justice Frankfurter observed, in order to give "the statute the full benefit of the presumption . . . , we must find clear incompatibility before it can be invalidated." *New York v. O'Neal*, 359 U.S. 1, 6 (1959). This "clear incompatibility" can hardly be said to have been presented by Petitioner's rote recitation of general equal protection principles.

Likewise, in the two cases upon which Petitioner seeks to predicate a conflict with "decisions of other state courts of last

resort" (i.e. *Estate of French, Key v. Doyle*, 365 A.2d 621 (Dist. Col. App. 1976) Cert. denied and App. dism'd 434 U.S. 59 (1977); and *In re Estate of Cavill*, 459 Pa. 411, 329 A.2d 503 (1974), there is only a faint resemblance to the case now before the Court. In those two cases, the "Mortmain" statutes negated any devises or bequests to religious groups made within thirty days of the death of the testator. Those statutes and the Arkansas one here stand on distinguishable jurisprudential grounds. As the Pennsylvania Supreme Court noted in analyzing the practical effect of the "Mortmain" statute:

> "While the legislative purpose is to protect the decedent's family, the statute nevertheless seeks to nullify bequests to charity even where, as here, the testator leaves no immediate family . . . This protection of a nonexistent "family" defeats the testator's expressed intent without any relation to the purpose which is thought to be promoted, further demonstrating the irrationality of the statutory classification." 329 A.2d at 506.

This practical effect of defeating the testator's expressed intent highlights a critical distinction between the statutes involved for the only act which is required to give full effect to the testator's intent under Arkansas Statute §60-501 is for the decedent to simply have made out a will including the spouse of less than a year, a small act indeed. While we acknowledge that this distinction in itself is not determinative for purposes of certiorari, we likewise submit that it is dispositive in showing that no conflict exists among the highest courts of the various states for it shows that different questions were presented in the cases cited by Petitioner.

2. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Petitioner has failed to sustain her burden for showing that a substantial federal question is presented to this Court for two reasons. First, there is a complete dearth of

any showing that more than a minuscle number of people (i.e., those married less than a year who have not been devised or bequeathed an amount of the decedent's estate equal to or greater than the statutory share) in one state could conceivably be affected by this statute. There has been no argument or rationale advanced to remove this case from what this Court has previously negatively referred to as the "episodic" in denying certiorari. (*Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) or that there is any overriding importance to the public as distinguished from the parties (*Layne and Bowler Corp. v. Western Wellworks*, 261 U.S. 387, 393 (1923) so as to justify certiorari being granted.

Secondly, inasmuch as the petitioner's equal protection attack upon the statute in question rests solely upon the fact that there is a legislative classification involved, we submit that prior decisions prevent any substantial federal question from being raised. This Court has previously acknowledged a state's significant interest in regulating the disposition of an individual's property at death (See *Harris v. Zion's Bank Co.*, 317 U.S. 447, 63 S. Ct. 54 (1943) and has previously acknowledged that the state's power in this area permits it constitutionally to determine who may give and who may receive property at death, whether by will or intestacy, under what circumstances and by what methods (See *Labine v. Vincent*, 401 U.S. 532, 537 (1971), reh. den. 402 U.S. 990 (1971). In that case, Mr. Justice Black, speaking for the Court, observed the following about Louisiana's Intestate Succession laws and Constitutional anaylysis:

> "Even if we were to apply the rational basis test to the Louisiana Intestate Succession Statute, that statute clearly has a rational basis, in view of Louisiana's interest in directing the disposition of property left within the state." 401 U.S. at 536.

. . .

> "The choices reflected by the Intestate Succession Statute are choices which it is within the power of the state to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation, because the Justices of this Court believe that they can provide better rules." id. at 537.

Regardless of how it is twisted or turned, it is an invasion upon the normal zone of State decision making which the petitioner asks this Court to make solely upon the grounds that the Arkansas Legislature has elected to treat surviving spouses married to the decedent more than a year differently from those married less than a year. As Mr. Justice Stewart once noted:

> "... such discrepancies are the inevitable concomitant of the line drawing that is essential to law making. So long as the classification is rationally related to a permissible legislative end, therefore, ... there is no denial of equal protection." *Kramer v. Union Free School District*, 395 U.S. 621, 637 (1969).

CONCLUSION

Here there is no suspect classification so as to warrant strict scrutiny, and no mandate that the State demonstrate that the statutory distinction as drawn was done so with mathematical precision (See *Dandridge v. William*, 397 U.S. 471, 90 S.Ct. 1153 (1970). There is merely a statute addressing an area uniquely appropriate for state legislation and no defect contained in it, other than a classification. This Court has made clear findings about such a set of facts in the past. As we have shown above, there is no need to do so again.

Respectfully submitted,

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Attorney for Respondent

AFFIDAVIT OF SERVICE

The affiant, Merl O. Barns, counsel for Respondent, after being duly sworn, certifies that on March 14, 1985, pursuant to Rule 28.5 (c), Rules of the Supreme Court, I served Carolyn Epperson three copies of the attached Brief in Opposition to Petition for Writ of Certiorari on each of the parties herein, as follows:

On Carolyn Epperson herein, by hand-delivering to the office address of Richard L. Smith, the above-named Carolyn Epperson's counsel of record at Suite 727, Pyramid Place, P.O. Box 3644, Little Rock, Arkansas 72203.

All parties required to be served have been served.

/s/ Merl O. Barns
Merl O. Barns

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Little Rock, AR 72201
(501) 372-3148

Attorney for Respondent

SUBSCRIBED AND SWORN TO before me on this 14th day of March, 1985.

/s/ Jeanie Ruth Stare
Notary Public

My Commission expires:

10-1-90